No. 93-1515

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

DOROTHY E. MEGGERS, JAMES C. EWIN, and DOROTHY C. EWIN,

Petitioners,

v.

EXXON COMPANY, U.S.A., WILLIAM A. PERDUE, CHEL GOLANSKY and MARK I. HOLLAND,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should A Petition For Writ of Certiorari Which Challenges The Constitutionality Of A State Statute Be Granted When The Challenge Was Not Timely Raised Below?

RULE 29.1 STATEMENT

Respondent Exxon Company, U.S.A. is an unincorporated division of Exxon Corporation and has no subsidiaries.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.1 STATEMENT ii

TABLE OF AUTHORITIES iv

STATUTORY PROVISION INVOLVED 1

STATEMENT 2

A. The Instant Action 2

REASONS WHY THE PETITION SHOULD BE DENIED 5

1. Neither The Decision Below Nor The Record Raises The Questions Presented In The Petition 5

2. No Special and Important Reasons Exist For Granting Certiorari 8

3. Petitioners Possess No Cause of Action Constituting A Property Right 9

4. There Is Insufficient State Action to Afford Petitioners The Protection Of The Due Process Clause 11

5. Virginia Code §8.01-230 Treats All Persons Similarly Situated Alike 13

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

Alexander v. Beech Aircraft Corp., 952 F.2d 1215 (10th Cir. 1991) 9, 10, 11

Atchafalaya Land Co. v. F.B. Williams Cypress Co., 258 U.S. 190 (1922) 9

Bailey v. Anderson, 326 U.S. 203 (1945) 6, 7

Beck v. Washington, 369 U.S. 541 (1962) 7

Blum v. William Yaretsky, 457 U.S. 991 (1982) 12

Board of Regents v. Roth, 408 U.S. 464 (1972) 9, 10

Cardinale v. Louisiana, 394 U.S. 437 (1969) 5

Central Union Tel. Co. v. City of Edwardsville, 269 U.S. 190 (1925) 6

City of Cleburne, Texas v. Cleburne Living Center, Inc., 473 U.S. 432 (1985) 13

Exxon Corp. v. Eagerton, 462 U.S. 176 (1983) 7

Ferguson v. Georgia, 365 U.S. 570 (1961) 5, 7

Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978) 12

Hess v. Snyder Hunt Corp., 240 Va. 49, 392 S.E.2d 817 (1990) 9, 10

In re: Lamkin, 355 U.S. 59 (1957) 5

International Union, United Mineworkers v. Covenant Coal Corp., 244 Va. 417, 423 S.E.2d 197 (1992) 7

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923) 9

Mahone v. Addicks Utility Dist. of Harris County, 836 F.2d 921 (5th Cir. 1988) 13

TABLE OF AUTHORITIES – Continued

Page

McGoldrick v. Compagnie Generale, 309 U.S. 430 (1940) 5

Murphy v. Comm., 246 Va. 136, 431 S.E.2d 48 (1993) 6

Mutual Life Insurance Co. v. McGrew, 188 U.S. 291 (1903) 5, 6

Parker v. Illinois, 333 U.S. 571 (1948) 5, 7

Pennsylvania R. Co. v. Illinois Brick Co., 297 U.S 447 (1936) 5

Silver v. Silver, 280 U.S. 117 (1929) 9

Street v. New York, 394 U.S. 576 (1969) 5

Terry v. Anderson, 95 U.S. 628 (1877) 9

Texaco, Inc. v. Short, 454 U.S. 516 (1982) 9

Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478 (1988) 10, 13

Via v. General Elec. Co., 799 F.Supp. 837 (W.D. Tenn. 1992) 10, 11

STATUTES AND RULES

Constitution of the United States, Fourteenth Amendment 12, 13

28 U.S.C. §1257(a) 5

Virginia Code §8.01-230 ..... *passim*

Virginia Code §8.01-243(b) 3, 4, 6, 10, 11

Rules of the United States Supreme Court of the United States, Rule 10 ..... 5, 8

Rules of the Supreme Court of Virginia, Rule 5:25 ... 4, 6

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Exxon Company, U.S.A., respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Supreme Court of Virginia's Order in this case.

STATUTORY PROVISION INVOLVED

Respondent agrees that petitioners put Virginia Code §8.01-230 at issue but did not place before the Court any other statutes in their questions seeking certiorari.

STATEMENT

This case involves two pieces of commercial property in Arlington, Virginia, both of which were, at one time or another, operated as retail gasoline service stations. The former Exxon property is located several hundred feet away, and across the street from the petitioners' property (the "Property").

A. The Instant Action

Petitioners filed the instant action in the Circuit Court of Arlington County, Virginia, on March 15, 1991, alleging that their Property was damaged by contamination which was discovered in June, 1990 and that that contamination emanated from the Exxon property. The record clearly demonstrates that the only evidence of a release of petroleum product on the Exxon property is the testimony of Exxon's former operator, Alfred Perdue, who testified that he had a loss of product in November, 1977. Immediately after Mr. Perdue notified Exxon of the loss, Exxon investigated the incident and fiberglass lined the underground storage tank in question to ensure it would not leak.

The Virginia statute of limitations requires all causes of action for injury to property be brought within five years of the breach of duty. At the close of all discovery the only evidence of a breach of duty was the November, 1977 incident. Since the trial court action was filed almost nine years after that breach, Exxon filed several pre-trial motions to limit and/or dismiss the petitioners' Motion for Judgment on the basis that the five year statute of limitations set forth in Va. Code §§8.01-230 and

8.01-243(b) barred their claims. Judge Sheridan initially ruled that the statutes of limitations set forth in Va. Code §§8.01-230 and 8.01-243(b) did apply to the facts of this case and that the statutes may bar the petitioners' claims unless the petitioners could show an equitable estoppel that would prevent Exxon from relying on the statute of limitations as a defense. (February 4, 1993 Transcript at T.20-3 to 9; T.25-8 to 19).

Immediately prior to the beginning of trial, Judge Kendrick (the trial judge) judicially noticed Judge Sheridan's prior rulings and directed the petitioners to proffer evidence as to what they would offer to prove to establish that there was an equitable estoppel. Petitioners were unable to proffer any such evidence. Consequently, Judge Kendrick found that the petitioners had failed to present sufficient evidence to create a justiciable issue for trial on the issue of estoppel. There being no evidence of estoppel, Exxon again moved to dismiss the petitioners' claims on the basis that the claims were barred by Va. Code §§8.01-230 and 8.01-243(b). Judge Kendrick granted Exxon's motion and petitioners sought reconsideration of Judge Kendrick's order dismissing their claims.

Petitioners make a procedural misstatement when they claim that they raised the constitutionality of Va. Code §§8.01-230 and 8.01-243(b) at the March 9, 1993 trial and April 30, 1993 motion for reconsideration.[1] As the

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[1] Petitioners also made several factual misstatements. For the sake of brevity, respondent will only highlight the more significant misstatements. First, the record contains no evidence of a breach of duty other than Mr. Perdue's testimony of a loss of product in November, 1977. Second, Exxon has complied with

transcripts of those proceedings demonstrate, the petitioners neither raised, nor did the court decide, the questions petitioners now raise in their petition. In fact, the very first time petitioners raised the constitutionality of Va. Code §§8.01-230 and 8.01-243(b) was when Judge Kendrick was about to enter an order denying petitioners' motion for reconsideration. Petitioners submitted a form of order which stated Va. Code §§8.01-230 and 8.01-243(b) violated petitioners' due process and equal protection rights. Judge Kendrick rejected petitioners' form of order and entered an order which simply denied petitioners' motion for reconsideration.

Petitioners then petitioned the Virginia Supreme Court to review Judge Kendrick's decision on the basis that Va. Code §§8.01-230 and Va. Code 8.01-243(b) violated petitioners' due process and equal protection rights as provided by the Virginia and United States Constitutions. Respondent opposed that review on the basis that the Virginia Supreme Court did not have jurisdiction to review the writs of error challenging the constitutionality of Va. Code §§8.01-230 and 8.01-243(b) because petitioners had never properly raised those questions to the trial court. Rules of the Virginia Supreme Court, Rule 5:25

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whatever the Virginia Department of Water Quality has requested it to do to investigate and remediate any contamination associated with the Exxon property. Third, petitioners' experts were never able to identify with a reasonable degree of scientific probability, the source of contamination on petitioners' property. Moreover, the scientific evidence not only disputed petitioners' claims that Exxon contributed to the contamination on petitioners' property, but pointed to a source petitioners failed to join as a party.

Without commenting on petitioners' writs of error, the Virginia Supreme Court denied review of Judge Kendrick's order. Petitioners now ask this Court to grant their petition even though their questions presented were never properly raised or decided by any of the state courts below.

REASONS WHY THE PETITION SHOULD BE DENIED

1. Neither The Decision Below Nor The Record Raises The Questions Presented In The Petition

The jurisdiction of this Court in this matter is contingent upon the petitioners' ability to demonstrate that the highest Virginia court decided an important question of federal law that the petitioners properly raised and was decided by that court. 28 U.S.C. §1257(a); *Cardinale v. Louisiana,* 394 U.S. 437, 438 (1969); *McGoldrick v. Compagnie Generale,* 309 U.S. 430, 434 (1940); Rules of the Supreme Court of the United States, Rule 10 (hereinafter "Rule"). The burden rests on the petitioners to show that the question was properly raised to the highest Virginia court. *Street v. New York,* 394 U.S. 576, 582 (1969); *Mutual Life Insurance Co. v. McGrew,* 188 U.S. 291, 309 (1903).

The procedure for raising a federal question is dependent upon state law. When required by state procedures, federal questions must be timely raised and presented in order to be reviewed. *Ferguson v. Georgia,* 365 U.S. 570, 572 (1961); *In re: Lamkin,* 355 U.S. 59 (1957). The failure to follow state procedures may be fatal to the chances for Supreme Court review. *Parker v. Illinois,* 333 U.S. 571, 574-575 (1948); *Pennsylvania R. Co. v. Illinois,* 297

U.S. 447, 462-463 (1936); *Central Union Tel. Co. v. City of Edwardsville*, 269 U.S. 190, 194-195 (1925).

If the state appellate court is silent or refuses to rule on the federal question, it is presumed that the petitioner never properly presented the question in the state court. *Bailey v. Anderson*, 326 U.S. 203, 206-207 (1945). In *Bailey*, this Court dismissed an appeal of an order of the Virginia Supreme Court denying a writ of error on the basis that the issue was not properly raised in the state court below and, thus, the petition did not properly present a federal question. *See also, Mutual Life*, 188 U.S. at 309 (where this Court declined to exercise its jurisdiction where the highest state court was silent on the federal question and this Court assumed the silence was due to a procedural deficiency to raise the federal question).

The record clearly demonstrates that the petitioners never properly raised the questions presented in the state court below. Moreover, Rule 5:25 of the Rules of the Supreme Court of Virginia, states that errors will not be considered by that court if they were not raised at the time of the ruling being appealed.

Although petitioners did not question the constitutionality of Va. Code §§8.01-230 and 8.01-243(b) when the trial court made its ruling, they nonetheless petitioned the Virginia Supreme Court to review whether those statutes violated their rights under the Due Process and Equal Protection Clauses of the Constitutions of the Commonwealth of Virginia and the United States of America. Respondent argued that the questions were not raised below and thus, were not properly before the court. Rule 5:25. *See Murphy v. Comm.*, 246 Va. 136, 431 S.E.2d 48

(1993); *International Union, United Mineworkers v. Covenant Coal Corp.*, 244 Va. 417, 423 S.E.2d 197 (1992). Petitioners never disputed the fact that they had not timely raised those questions below.

The Virginia Supreme Court was silent on the questions raised by petitioners and denied review of the trial court's decision. The court's silence entitles respondents to a presumption that the petitioners never properly presented the questions to the state court. *Bailey*, 326 U.S. at 205-207; *See also Beck v. Washington*, 369 U.S. 541, 550 (1962) (where this Court recognized the reasonableness of the Washington Supreme Court's refusal to "consider constitutional attacks upon statutes not made in the trial court even where the constitutional claims arise from the trial court's interpretation of the challenged statute"); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983) (where this Court concluded that it lacked jurisdiction to consider a federal question because it did not affirmatively appear that the question was decided in the manner required to bring that issue before the state appellate court since appellants first raised the question in their brief to state supreme court; that court did not pass on the issue; and the requirement of that state's appellate court was not to consider issues raised for the first time on appeal).

Petitioners have not made any effort to overcome the presumption that they did not timely raise their questions to the court below. Since the Virginia Supreme Court did not have jurisdiction to hear this matter, it follows that this Court does not have jurisdiction to hear this petition. *Ferguson*, 365 U.S. at 572; *Parker*, 333 U.S. at 574-575.

2. No Special Or Important Reasons Exist For Granting Certiorari

Rule 10 sets forth the considerations governing this Court's review of writs of certiorari. That Rule requires that a petition will be granted only when there are "special and important reasons" to do so. The Rule also sets forth several reasons that the Court will consider in granting certiorari. The only reason petitioners cite for this Court's favorable consideration of their petition is that:

> the Virginia court of last resort has decided an important question of federal law which has not been, but should be, settled by this Court.

See Petitioners' Petition for a Writ of Certiorari, p.16; Rule 10(c). Since the record does not support granting certiorari for this reason, this Court does not have jurisdiction to review this petition.

Specifically, the Virginia Court of last resort did not decide an important question of federal law. Although petitioners argue that the Virginia Supreme Court decided the questions they have presented, the record clearly demonstrates it did not. In fact, none of the Virginia courts in this matter reviewed, decided or even entered an order regarding petitioners' constitutional claims.

Furthermore this Court has sought to "be consistent in not granting the writ of certiorari except and in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties in cases where there is a real and embarrassing conflict of opinion and authority between the circuit

courts of appeal." *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

This case does not involve principles important to the public. Nor does it involves a conflict of opinion among the courts of appeals. Moreover, in light of the fact that none of the Virginia courts decided an important question of federal law, this Court must deny petitioners' petition for writ of certiorari for lack of jurisdiction or, alternatively, for absence of "special and important reasons". Rule 10.

3. Petitioners Possess No Cause of Action Constituting A Property Right

Entitlement to the protections of the Due Process Clause of the Fourteenth Amendment is predicated upon the deprivation of a property right by state action. Due process protections only extend to "existing" rights. *Alexander v. Beech Aircraft Corp.*, 952 F.2d 1215, 1225 (10th Cir. 1991) (where the court found that a cause of action that had not vested was not a property right entitled to the protections of the Fourteenth Amendment). *See also Texaco, Inc. v. Short*, 454 U.S. 516 (1982); *Silver v. Silver*, 280 U.S. 117, 122 (1929); *Atchafalaya Land Co. v. Williams Cypress Co.*, 258 U.S. 190 (1922); *Terry v. Anderson*, 95 U.S. 628 (1877); *Hess v. Snyder Hunt Corp.*, 240 Va. 49, 54 n.3, 392 S.E.2d 817, 821 n.3 (1990).

Property rights are created, and their dimensions defined, by state law. *Board of Regents v. Roth*, 408 U.S. 464, 577 (1972). Moreover, the deprivation of a property right must be caused by sufficient state action to warrant

the protections of the Due Process Clause. *Tulsa Professional Collection Services, Inc. v. Pope,* 485 U.S. 478 (1988).

The petitioners have argued that one of their property rights consists of causes of action in trespass and nuisance and since Va. Code §§8.01-230 and 8.01-243(b) extinguished their right to bring these causes of action, they are unconstitutional.[2] Petitioners' arguments are without merit.

First, Virginia law determines when and whether a Virginia citizen has a property right. *Roth,* 408 U.S. at 577. In this case, the Virginia legislature enacted a statute, the purpose of which, was to extinguish any right to bring a cause of action five years after the injury or breach occurred, regardless of whether the individual even had the right to bring the cause of action when the statutory period expired. Thus, the effect of the statute is that of a statute of repose. *Via v. General Elec. Co.,* 799 F.Supp. 837, 839 (W.D.Tenn. 1992). The Virginia Supreme Court has clearly held that statutes of repose that bar a cause of action before injuries are incurred do not violate due process or equal protection. *Hess,* 240 Va. at 52, 392 S.E.2d at 826.

Second, a cause of action is a species of property protected by the Due Process Clause only when there is an "existing" right to bring the cause of action. *Alexander,* 952 F.2d at 1255. The statutes in question required all

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[2] It is important to note that while the petitioners' brief alleges that both Va. Code §§8.01-230 and 8.01-243(b) violate the Due Process Clause, their questions presented only allege that §8.01-230 is unconstitutional. Thus, any questions relating to Va. Code §8.01-243(b) are not properly before this Court.

causes of action to be brought within five years after the injury or breach occurred. Va. Code §§8.01-230 and 8.01-243(b). Petitioners, initially alleged, and discovery confirmed, that the only breach of duty occurred in November, 1977. Thus, petitioners had until November, 1982 to file suit. However, petitioners did not file until March, 1991, almost nine years after the statute expired. Petitioners acknowledge that they could not have filed suit any earlier because they did not have an existing right to bring a cause of action. Thus, petitioners' causes of action were never entitled to the protections of the Due Process Clause. *Alexander*, 952 F.2d at 1225.

Moreover, all of the cases cited by the petitioners involved "existing" rights to bring a cause of action. Since, the petitioners admit that they did not have an existing right to bring a cause of action within the requisite five year period, these cases do not support petitioners' argument.

Finally, petitioners have asked this Court to declare Va. Code §8.01-230 unconstitutional on the basis that it extinguished petitioners' right to bring a cause of action they admit they never had. To do so would not only negate the intended effect of statutes of repose, but also be tantamount to conferring on petitioners a property right when the Virginia legislature chose not to do so. *General Elec.*, 799 F.Supp. at 840.

4. There Is Insufficient State Action to Afford Petitioners The Protection Of The Due Process Clause

Petitioners raise two due process arguments: that Virginia took their property without compensation and,

that the Virginia statute of limitations extinguished their right to bring a cause of action before they had the right to bring the cause of action. Because neither of these claims involve sufficient state action to afford petitioners the protection of the Due Process Clause, the petition should be denied.

First, petitioners actually allege that a private party, the respondent, took their property, and that Virginia allowed or acquiesced in respondent's actions. This Court has consistently upheld the principle that private actions merely allowed or acquiesced in by a state do not constitute state action for the purpose of the Fourteenth Amendment due process analysis. *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 164 (1978). A state will normally only be held responsible for private actions where the state has exercised coercive power and provided significant encouragement such that the private action involved is deemed to be that of the state's. *Blum v. William Yaretsky*, 457 U.S. 991, 1004 (1982).

It would be ridiculous to even suggest that there was sufficient state action in this case, because to do so would have required Virginia to coerce or encourage Exxon to release product from one of its underground storage tanks in November, 1977. Thus, any actions at the Exxon station which gave rise to the breach of duty in November, 1977, did not involve state action and did not violate the Due Process Clause of the Fourteenth Amendment.

Second, the only state action involving the statute of limitations is the Virginia legislature's passing of that statute. Since Virginia had no role to play beyond the mere enactment of the statute, the statute is considered to

be self-executing. While the mere enactment of a statute constitutes state action, this Court has repeatedly held that the enactment of self-executing statutes of limitations are not sufficient state action to trigger the protections of the Due Process Clause. *Tulsa,* 485 U.S. at 485. There being no such state action here, Va. Code §8.01-230 does not violate the Due Process Clause of the Fourteenth Amendment.

5. Virginia Code §8.01-230 Treats All Persons Similarly Situated Alike

The Equal Protection Clause of the Fourteenth Amendment essentially directs that all persons similarly situated be treated alike. *City of Cleburne, Texas v. Cleburne Living Center, Inc.,* 473 U.S. 432, 439-440 (1985). Equal protection requires that laws not only be equal on their face, but also in their application. *Mahone v. Addicks Utility Dist. of Harris County,* 836 F.2d 921, 932 (5th Cir. 1988). "If the challenged government action does not appear to classify or distinguish between two or more relevant persons or groups, then the action does not deny equal protection of the laws." *Id.* at 932.

The petitioners' equal protection argument is based on the belief that Va. Code §8.01-230 treats potential trespass and nuisance claims differently than other potential claims. The petitioners have failed to identify the basis of the unequal treatment other than to argue that the drafters of the statute did not intend to extinguish claims for trespass and nuisance prior to the time those claims vested.

On its face, Va. Code §8.01-230 does not classify or distinguish between potential claims. Thus, we must determine if the application of the statute to the petitioners' claim treats similarly situated persons alike.

The class of persons at issue includes anyone who has a potential cause of action for injury to person or property. There is no disparity in the application of Va. Code §8.01-230. It treats all potential causes of action for injury the same, in that all such causes of action can be extinguished prior to the time the right to bring the cause of action vests. Consequently, respondent maintains that the application of Va. Code §8.01-230 does not violate equal protection of the laws.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

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